Docket No. 14872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARMON METZ WALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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GUY A. B. DOVELL
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TACOMA 2, WASHINGTON

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

On June 21, 1935, appellant upon his plea of guilty to charges of violating the Lindbergh Law (Title 18, U.S.C.A., Section 1201, formerly 408a and 408c), received an aggregate sentence of 45 years' imprisonment imposed by the United States District

Court of the Western District of Washington, Southern Division.

Appellant was thereafter confined in the federal prison on Alcatraz Island, in the Southern Division of the Northern District of California, from which jurisdiction he has sought release by instituting the following previous proceedings:

1. Petition to the Court of Appeals, Ninth Circuit, to allow an appeal from order of May 11, 1939, denying his petition for writ of habeas corpus and certifying his grounds of appeal were frivolous, upon which certificate the appellate court denied appeal in forma pauperis.

Waley v. Johnston, Warden, May 23, 1939, 104 F. 2d 760.

2. Appellant thereafter addressed his application to appeal in forma pauperis from an adverse judgment in habeas corpus proceedings. The appellate court determined such application should be addressed to the district court and denied his application.

Waley v. Johnston, Warden, March 4, 1940, 110 F. 2d 234.

3. Appellant next attempted to have the Lindbergh Law declared unconstitutional because the term of imprisonment was left to the discretion of the trial court.

His appeal from order denying such application resulted in affirmance of the decision of the district court.

> *Waley v. Johnston, Warden*, June 19, 1940, 112 F. 2d, 749, Cert. den., 311 U.S., 649, rehearing den. 311 U.S., 729.

4. A petition for writ of habeas corpus on the ground that threats of FBI agents induced his plea of guilty, which, according to judicial count, was his eighth in said court, resulted in the issuance of a show cause order and appointment of counsel to represent appellant. Following a formal return by the Government, the matter was argued, briefed and submitted upon the petition and the court record, and thereafter the petition was denied.

> *Waley v. Johnston, Warden*, April 15, 1941, 38 Fed. Supp. 408, aff'd. 124 F. 2d 587.

In his petition, we are informed by the appellate decision, he also set up the ground that the kidnapped person was not transported outside the State of Washington.

The majority opinion was to the effect that no question of fact was presented and affirmed the district court's decision.

As pointed to by the district court and discussed by the dissenting member of the appellate, the return

made no denial of the allegations of coercion specifically set forth and relied on in the petition, and in reversing the court of appeals the supreme court, on the principle laid down in *Walker v. Johnston*, 312 U.S. 275, held when a habeas corpus petition raises a material issue of fact the prisoner must be produced and the matter heard by the court.

Waley v. Johnston, 316 U.S., 101.

The foregoing was not appellant's first attempt to obtain consideration in the supreme court. In the October term of 1939, appellant's motion for leave to file petition for writ of habeas corpus was denied.

Ex Parte Harmon Metz Waley, 308 U.S., 528.

5. Upon remand from the supreme court for hearing, the matter was heard on appellant's two contentions, above stated, and was dismissed.

From the order dismissing the writ, appellant again appealed to the court of appeals, and this court affirmed the district's court decision and in the language of headnotes one and two, respectively, of its decision in *Waley v. Johnston*, Dec. 7, 1943, 139 F. 2d, 117, held:

> "In habeas corpus proceedings, evidence held to justify District Court's finding that petitioner, in his counsel's presence, voluntarily entered pleas of guilty of kidnapping after being advised

by counsel that his previous confessions, not introduced in evidence, that he took victim into another State, could not be used against him, if secured by intimidation and threats, as he claimed."

"A confession of crime, induced by intimidation and threats, but not introduced in evidence against defendant, cannot give him immunity from result of his free and voluntary pleas of guilty."

In conclusion, this court at page 121, stated:

"The only question on this habeas corpus proceeding is whether the plea of guilty was freely and voluntarily entered. The court found that it was. There is ample evidence to sustain that finding."

Certiorari was denied in *Waley v. Johnston*, February 28, 1944, 321 U.S. 779, and rehearing denied April 3, 1944, 321 U.S., 804.

This denial by the supreme court was followed by appellant's motion in said court to file his petition for a writ of habeas corpus, which motion was denied.

Waley v. Johnston, May 21, 1945, 325 U.S., 835.

And a similar denial was had in the October Term, 1945.

Waley v. Johnston, Warden, 326 U.S., 684.

6. In appellant's further application for a writ of habeas corpus, admittedly his fifteenth in the federal courts of the ninth circuit, appellant set up no

new grounds for relief and the same, on appeal, was held properly denied.

Waley v. Johnston, Warden, 163 F. 2d, 556, Cert. den. Nov. 10, 1947, 332 U.S., 818.

7. The appellant next filed his motion with the trial court to vacate the judgment and set aside the sentence of the United States District Court for the Western District of Washington, Southern Division. This motion was made pursuant to Title 28, U.S.C.A., Section 2255.

On April 18, 1949, the district court, on its own motion, denied the appellant's motion from which order an appeal was taken.

Appellant's contention was to the effect that the indictment did not allege that the victim was unlawfully held at the time of interstate transportation.

Upon the facts alleged as to dates of kidnapping and transportation and failure to release within seven days, this court found no merit in appellant's contention and affirmed the judgment.

Waley v. United States, Dec. 9, 1949, 178 F. 2d, 311, Cert. den. May 29, 1950, 339 U.S., 967.

Appellant in his second motion filed April 20, 1955, and made also pursuant to Title 28, U.S.C.A., Sec. 2255, does not set forth any facts in support of

his accusations against the courts and its officers, but accuses them of "railroading him" to prison for an offense that was never committed.

Appellant also contends and accuses the trial court of being "afraid to mention anything about defendant's *right* to jury trial, for fear that he would demand such *right*, and before all the people, so that defendant could not be so easily railroaded into prison."

The district judge in the trial jurisdiction found not the slightest basis in the record for the assertions in defendant's motion and also found that defendant freely and voluntarily entered a plea of guilty to Counts I and II of the indictment, and by such plea all averments of fact were admitted, that all defenses were waived, the prosecution was relieved from the burden of proving any fact, and jury trial was not required, and because no basis or merit for defendant's motion appeared either in the motion or in the records and files in the case, denied such motion by order entered June 17, 1955.

QUESTION PRESENTED

Was the appellant, upon the motion and the files and records of this case, entitled to another hearing before the trial court?

ARGUMENT AND AUTHORITIES

The pertinent portion of Title 28, U.S.C.A., Sec. 2255, covering the procedure pursuant to motion herein made, are as follows:

* * * * *

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

* * * * *

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

In *Barrett v. Hunter*, 180 F. 2d, 510, 514, it is held:

"If the motion and the records and files of the case conclusively show that the prisoner is not entitled to any relief, the court is not required to entertain the motion."

* * * * *

"But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of sound discretion, the court should require the production of the prisoner."

In the dissenting opinion in *Barrett v. Hunter, supra,* at page 518, it was conceded:

> "It is, of course, true that if the record of the trial court affirmatively reveals that his rights to counsel were explained to him, that the court offered to appoint counsel for him, and that he waived the benefit of counsel, that such records are conclusive and that in the face thereof his allegations in the motion in the sentencing court and in the complaint in the habeas corpus action to the contrary do not raise any issues of fact that would entitle him to the right to produce testimony."

The motion in this instance does not challenge the conviction on facts *dehors* the record, as in *United States v. Hayman,* 342 U.S. 205, or in *Waley v. Johnston,* 316 U.S., 101.

The record in this case, as reported in *Waley v. Johnston,* 139 F. 2d, 117, 119, is conclusive that appellant first waived the assistance of counsel, that the court, neverthless, appointed counsel for him, and offered to appoint separate counsel, but each, he and his wife, expressed satisfaction with the appointment of single counsel. The record in the case, as reported in *Waley v. Johnston, supra,* further shows that:

> "Thereupon, the receiving of the pleas was postponed until another date at which time the defendant returned into court with his attorney and again signified his desire to plead guilty which was then accepted in open court and entered of record."

There was absolutely no objection, claim, nor notice to the court of any alleged conflict between the interest of these defendants, and under the circumstances there was no apparent reason, nor does any appear in the motion or the files and records of the case, why single counsel to represent these defendants was a denial of their constitutional right to effective assistance of counsel.

See *Lott v. U. S.*, 218 F. 2d, 675.

In his fishing expedition for ascertaining further grounds of objections to his conviction, the appellant asserts in his motion and brief his right to a jury trial.

Competent counsel was appointed for appellant to whom he could convey a request for a jury trial. There was no further obligation on the court to advise him of his various rights.

> "The appellant had the right to a jury trial. He waived the right when he entered his pleas. 'A man may effectively by his own voluntary act surrender his liberty or part with his life by pleading guilty. No public policy forbids this, and a defendant's right so to do is nowhere forbidden by the Constitution.' *Patton v. United States*, 281 U.S., 276, 281, * * *."
>
> *Bugg v. United States*, 140 F. 2d, 848, Cert. den., 323 U.S. 673.

Appellant further asserts his right to the death penalty under the statute, which he states was impos-

sible where there was no jury allowed the defendant. (Appellant's Brief, page 9).

Aside from the matter of waiver, the issue is academic, moot and without merit.

The appellant knowingly and voluntarily pleaded guilty to an offense which he now claims he did not commit. It is the appellee's contention that any question of appellant's guilt or innocence, including the matter of interstate transportation, is foreclosed by the judgment and conviction.

U. S. ex rel Simkoff v. Mulligan, U. S. Marshal, 67 F. 2d, 321;

Blair v. White, Warden, 24 F. 2d, 323;

Levin v. U. S., 5 F. 2d, 598;

Brady v. U. S., 24 F. 2d, 399.

In addition, this court has already determined that the indictment to which appellant pleaded guilty charged a federal offense of kidnapping.

Waley v. U. S., 178 F. 2d, 311, 312.

Each of the cases cited by appellant on page 10 of his brief has to do with the necessity of corroborative proof in support of extrajudicial confession introduced in evidence. Appellant fails to distinguish between the use of such confessions and the voluntary plea of guilty entered in his case.

The appellant would proceed upon the theory that Section 2255 of Title 28, U.S.C.A., was enacted to afford him the opportunity to raise any nature of question directed to errors in his trial. It was neither intended to encompass all such issues, nor to impinge upon prisoners' rights of collateral attack upon their convictions.

> "On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." (Italics ours). *United States v. Hayman, supra.*

The courts have stated its purpose more in detail as follows:

> "This section relating to motion to vacate, set aside or correct sentence does not give a prisoner the right to obtain a review, first by the court imposing the sentence and then on appeal from denial of motion to vacate, of errors of fact or law that must be raised by timely appeal, and purpose of this section was not to confer a broader right of attack on judgment and sentence than might theretofore have been made by habeas corpus, but was rather to provide that attack which theretofore might have been made in some other court though resort to habeas corpus must now be made by motion in sentencing court, unless it shall appear that remedy by motion is inadequate or ineffective to test legality of prisoner's detention."
>
> *Barnes v. Hunter*, 188 F. 2d, 86, Cert. den., 342 U.S. 920.

See, to the same effect, following cases:

Masi v. U. S., 223 F. 2d, 132;

Osborne v. Looney, 221 F. 2d, 254;

Butler v. Looney, 219 F. 2d, 146;

Smith v. U. S., 205 F. 2d, 768;

Kahl v. U. S., 204 F. 2d, 864;

Mills v. Hunter, 204 F. 2d, 468;

Kreuter v. U. S., 201 F. 2d, 33;

Clough v. Hunter, 191 F. 2d, 516;

Crow v. U. S., 186 F. 2d, 704;

Hastings v. U. S., 184 F. 2d, 939;

U. S. v. Gallagher, 183 F. 2d, 342;

Davilman v. U. S., 180 F. 2d, 284;

U. S. v. Newman, 126 F. Supp., 94;

Also,

Jones v. Squier, 195 F. 2d, 179, and

Winhoven v. Swope, 195 F. 2d, 181.

CONCLUSION

For the foregoing reasons, the order of the district court denying defendant's motion to set aside the conviction, judgment, sentence, and commitment, was correct and should be affirmed.

Respectfully submitted,

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